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The role of the EU in the external reach of regulatory private law - gentle civilizer or neoliberal hegemon?

Epilogue

Hans-W. Micklitz[1]

External reach

The research question behind this book is whether and to what extent the internal achievements of the EU can be transferred to external application. The contributions carry a message – that the standards, codes and contracts the EU is producing – or that are produced in the EU – to extend and strengthen the external reach of EU law have at least the potential to turn the world into a 'better place'. Most of the authors are from inside the EU, have studied law in one of the Member States, and have been working with EU law for decades. Implicitly or explicitly they seem to start from the premise that the European integration project is defensible and that the external reach of European law, whether legitimate or not, whether within or beyond its competences, is not as such negative. They believe in the potential of the EU as an alternative model for a better, more social market and a more just society, thereby not saving on criticism. The supporters of the European integration project are not per se sceptical or critical of what Anu Bradford calls the 'Brussels effect'.[2] She views the global reach of EU law as a contingent preference for high standards internally. It is said to occur when nondivisibility of standards happens to arise largely outside of the hands of the EU, be it economic, legal or technical indivisibility. The research question that guides this book project differs in that the focus is laid on the export of genuine European values. In Europe and between European legal scholars, there is sympathy and intellectual support for an EU that promotes higher standards of health and safety, data privacy, environmental standards, sustainability, and consumer protection and that sets better procedural safeguards through broader participation of affected parties, a more developed accountability and transparency and promotion of institutional patterns of judicial review instead of arbitration. [3]

Such sympathy rests on a couple of premises that more stringent standards are better in reality, the procedural requirements more inclusive and the institutional safeguards more democratic. How to provide evidence for such a claim? Transnational law is full of standards, codes and contracts. In order to be able to make an assessment of 'better' and 'more', one needs first to study the law in the books and then the law in action. This is what these contributions have been doing, not least due to the insights the authors have gained over years of research. The search for the law in action is particularly difficult as it requires empirical research and access to documents which are usually in the hands of companies and subject to business secrets as well as access to non-governmental organisations,

[1] I would like to thank in particular Joanne Scott for thoughtful feedback, as well as Lucila de Almeida, Marta Cantero Gamito, Teemu Juutilainen, Rodrigo Vallejo and the participants of the faculty seminar at the EUI on 15 May 2019 for their comments. The usual disclaimer applies.

[2] Anu Bradford.'The Brussels Effect', Northwestern University Law Review 107 (2012), 1.

[3] See ECJ Opinion 1/17 ECLI:EU:C:2019:341 which will have a bearing on the future of arbitration in the European legal order.

national and supranational bodies which are meant to supervise and monitor enforcement of standards, codes and contracts. The series of contributions discloses the difficulty in selecting the 'correct' set of rules let alone in finding evidence for their practical importance in remote parts of the world.

However, even if the information made available suffices to assess the law in the books and the law in action, what is the yardstick against which it can be judged that standards, codes and contracts are better, fairer, more inclusive and more democratic – than what? What is the comparator and who decides on the comparator? More implicit than explicit, the contributions are engaged in a dialogue between the EU and the United States. This becomes clear mainly and mostly through the references which are used to discuss the different topics dealt with in the book. No word on China, India, Russia, no word on the revitalized discussion of the rich Global North against the poor Global South. There is an implicit assumption that higher health and safety standards, more stringent emission standards, and broader participation might produce better results, and mean increased justice for peoples – wherever they are living. Such an assumption requires not only a 'before' and 'after' but also evidence of the impact of EU rules and procedures on non-EU societies and non-EU economies. This is the kind of counter argument Bradford faces with regard to the Brussels effect. How can we speak about the Brussels effect without having a methodology that allows us to test the effects of European rules?[4] Again, even if such evidence of impact could be provided based on a sound methodology, if it could be shown that for example higher standards of food safety are better for the health of peoples and that American citizens benefit from the more stringent EU rules on health, safety, consumer and environmental protection, is it for the EU to decide what is good for all those who are not living within the territory of the EU?

Is the EU the 'gentle civiliser' in the meaning of Martti Koskenniemi,[5] or is the EU 'uncivilising' third countries, be it through excessive consumption patterns, the harmful activities of EU corporations, or the export of hazardous waste that poses a threat to human health and the environment abroad? Does the gentle civiliser know not only what is good for EU citizens but also what is good for the world? This comes close to a new form of colonialism and imperialism,[6] exercised and performed through the EU itself, through EU private bodies such as CEN and CENELEC with a public mandate and even through private regulators based in the EU but engaged in the promotion of higher, better, more just standards through codes and contracts?[7] The Treaty provides the EU with a mandate to promote EU values beyond EU borders. Articles 21 and 3 (5) TEU set a high benchmark for the values to be realised in EU external economic relations.[8] Article 21 (2) h) requires the EU to 'promote an international system based on stronger multilateral cooperation and good

[4] Mathias Siems and Urška Šadl raised these types of questions when Anu Bradford presented her book at the EUI in Florence on 8 April 2019. For a detailed analysis of the Brussels effect in competition law, G Monti, 'The Global Reach of EU Competition Law' in M Cremona/J Scott (eds) EU Law Beyond EU Borders The Extraterritorial Reach of EU Law, OUP 2019, 174.

[5] The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 (Hersch Lauterpacht Memorial Lectures, Band 14) 2010.

[6] I am aware of the sensitivity of the issue, but will leave the historical legacy and the normative dimension of the EU as gentle civilizer to a separate publication.

[7] See the contributions in the Special Section in the European Journal of International Law 'Symposium: Global Public Good and the Plurality of Legal Orders, in F Cafaggi (ed), Vol 23 No 3, August 2012, 643–792.

[8] V Kube, The EU's human rights obligations towards the wider world and the international investment regime, Making the promise enforceable, EUI phd 2018.

global governance'. In particular the plea for good governance triggered an inspiring debate on the relationship between the external dimension of EU law and private actors operating outside the EU but based in the EU.[9] But is such an extension morally and ethically justifiable and legitimate? Anu Bradford binds the identified Brussels effect to five conditions: market size, regulatory capacity, stringent standards, inelastic targets and nondivisibility.[10] Her major concern is the role and function of the EU as an empire which imposes its internal rules on the rest of the world, regardless of their quality and character. The EU, subject to compliance with these five conditions, is able to promote its own rules to the detriment of its key international regulatory competitors: the USA, China, and India. Bradford's book not only explains the Brussels effect: it also carries a normative message. The EU puts other states at a competitive disadvantage, which is justified by the values the EU promotes. The 'higher' and 'better' EU standards for a 'more just' society compete with other models of the economy and a society which rank non-economic values lower than the EU. All those who intend to participate in making the world a better place have to open an office in Brussels because it is Brussels where the action is.[11]

Standards, codes and contracts are not at the forefront of academic research on the European law of external relations. Quite to the contrary: the intellectual discourse is clearly divided. On the one hand there is the established literature on EU law on external relations, which focuses on competences, on how – and the degree to which – the EU legislature, the European Commission and the ECJ are shaping the external relations of the EU, in security, in trade, in finance, in environmental protection, in labour and more recently in migration. Private law, although it cuts across these policy fields, stays outside the agenda and leads a separate life. In terms of the external dimension of private law, private international lawyers enter the field and throw 150 years of discourse into the scales. Visible European private law, what I term European regulatory private law and its external dimension, remains largely outside the blossoming debate on the external reach of European Union Law.[12] When I read the recent book by Marise Cremona and Joanne Scott I felt as if there was a missing chapter – one on the external reach of European regulatory private law.[13]

On the other hand there is an abundant literature on transnational law, on transnational private regulation, on global administrative law and on global constitutionalism. This is the area where technical standards, codes of practice and contracts are studied in great detail, through an ever-growing range of case studies.[14] There is an astonishing gap in perspective. Transnational legal theorists refer to European private regulation as one form of transnational private regulation. European legal theorists on private regulation rely on transnational private regulation to build their arguments. The particularities of European

[9] B van Vooren/ St Blockmans/Jan Wouters (eds), The EU's Role in Global Governance, The Legal Dimension, OUP 2013; A Marx/M Maertens/J Swinnen/J Wouters, Private Standards and Global Governance, Economic, Legal and Political Perspectives, Edward Elgar 2012.

[10] Ch 9 of her upcoming book, on file with the author.

[11] D Vogel, Trading Up, Consumer and Environmental Regulation in a Global Economy, Harvard University Press 1997.

[12] With few exceptions, H-W Micklitz/ M Cremona, Private Law in the External Dimension of the EU, OUP, 2016.

[13] M Cremona/J Scott (n 4). The book contains a chapter by P Davies on EU Financial Stability and the Global Influence of EU law, but no contribution deals with ERPL more generally.

[14] Ch Joerges/E-U Petersmann (eds), Constitutionalism, Multilevel Trade, Governance and International Economic Law, Hart Publishing 2011; in particular the collection in T C Halliday/G Shaffer (eds.) Transnational Legal Orders, CUP 2015; Sabino Cassese (ed) Research Handbook on Global Administrative Law, Edward Elgar 2016.

private regulation remain somewhat under-researched. However, European private regulation takes place in a different regulatory environment, one which is more strongly entrenched by legal constraints beyond the nation state and beyond the EU legal order. The reason for the missing attention on the external reach of European private regulation might well be that private regulation does not start with the question who has the competence to do what, in what institutional frame, when and how. Private actors simply use freedom of contract beyond the nation state. They take action within the limits of *bonos mores*, reasonableness and good faith, whether individually or collectively and through whatever instruments of private ordering (USA) and private regulation (EU). They may develop a contractually defined institutional and procedural setting in which codes and standards are elaborated, or, rather, they may well instrumentalise contracts for the organisation of supply chains.

In a European perspective Joanne Scott is bridging the gap between the two perspectives through her distinction between extraterritoriality, which is claimed to be rare, and territorial extension 'where the EU uses the existence of a territorial connection with the EU (notably, but not only, market access) to influence conduct that takes place outside the EU.'[15] The contributions to the book do not – or only occasionally – touch upon competence and extraterritoriality. They all fit into Scott's category of 'extraterritorial extension' – through private regulation. Marta Cantero explained where the three categories – standards, codes and contracts – come from and why it makes sense to take a horizontal perspective.[16] The variety of forms and functions is inherent to private autonomy. Private law does not set limits to the fantasies of private parties. Understanding standards, codes and contracts as a variation of extraterritorial extension allows us to locate research on the external dimension of European regulatory private law within the overall discussion of the global reach of EU law, more precisely of EU private regulatory law in its relation to transnational law.[17]

The time we live in

When handing in our book proposal to the publisher, we promised to identify the potential contribution of the EU, of EU private and economic law and EU legal theory to the debate on transnational law. This is not an easy undertaking in the current political and intellectual climate, in particular if the argument is that the EU and EU law have something 'positive' to offer and even to deliver. Defending the EU and defending European law, whether inside or outside the EU, necessarily invites the accusation of being at least naïve if not a disguised 'neoliberal'.[18] Is it naïve to claim that European private regulation is promoting or may promote a good cause? Or is it a disguised neoliberal exercise, to focus on the external reach of private regulation, which rests in constitutional terms on market freedoms?[19] Going back

[15] J Scott, 'The new EU Extraterritoriality', CML Rev 51: 1343–1380, 2014 at 1344; same author, 'Extraterritoriality and Territorial Extension in EU Law', 62 AJCL (2014), 87–126.

[16] Introduction in this volume.

[17] The concept of European regulatory private law encompasses primary and secondary EU law as well as private regulation. Throughout the text I am using regulatory private law and private regulation interchangeably; see H-W Micklitz, 'The Visible Hand of European Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', in Yearbook of European Law 2009 (28), OUP 2010, 3–60

[18] There is certainly more to say on the variations of neoliberalism, eg, W Davies, The Limits of Neoliberalism, Authority, Sovereignty and the Logic of Competition, Sage 2014.

[19] The Treaties do not explicitly refer to private autonomy. This is claimed to be enshrined in the four market freedoms. For the first account ever, P- Ch Müller-Graf, 'Privatrecht und Europäisches Gemeinschaftsrecht:

to the title of the epilogue, is it imaginable to understand private regulation as a mode of promoting a good cause – justice and human rights – or is private regulation structurally and necessarily a means of promoting market freedoms and of undermining national social justice and European human rights? This is not the place to refer to the difference between the European understanding of private regulation and the American understanding of private ordering.[20] What matters, however, is the answer to the question whether the EU itself, EU-built private bodies or simply European associations and European companies are using standards, codes and contracts as a tool through which the ambitious objectives enshrined in Articles 21 and 3 (5) TEU are realized in practice or could be realized in the future. Or whether all these private activities are merely a means of undermining ambitious Treaty objectives, turning the EU into a hypocrite preaching human rights and social justice but actually practising economic freedoms?

There is a growing tension between those who see the EU as a potential civilizer and those who understand the EU as a neoliberal hegemon. In order to illustrate the context in which the positioning takes place I would like to contrast Wolfgang Streeck, a forceful critic of the EU[21] with Gráinne de Búrca, a supporter of the EU and its potential despite all its insufficiencies. In a recent interview with *Spiked*, Streeck characterized the EU with the following words.[22]

> Originally, the EU was an organisation for joint economic planning among six adjacent countries. The planning was sectorally specific, limited to coalmining and the steel industry, later also nuclear power, in the context of the state-managed capitalism of the postwar era. Then it grew into a free-trade zone, increasingly devoted to spreading neoliberal internationalism, in particular the free movement of goods, services, capital and labour, under the rubric of the Internal Market.
>
> As the number and heterogeneity of member states continuously increased, 'positive integration' became ever-more difficult. Instead, there was 'negative' integration: the removal of substantive regulations that impeded free trade within the bloc. After the end of Communism in 1989, the EU became a geostrategic project, closely intertwined with the US's geostrategy in relation to Russia. From the original six countries cooperating in the management of a few key sectors of their economies, the EU became a neoliberal empire of 28 highly heterogeneous states. The idea was and is to govern those states centrally by obliging them to refrain from state intervention in their economies…

Streeck's analysis condensed in an interview and necessarily somewhat catchy, but fully developed elsewhere, requires dismantling the EU, giving democratic control back to the people within the nation states and leaving any external extension to national legal orders, if any. In line with Streeck, a growing strand of literature is pointing to market bias and the market rationality of the EU that undermines national democracies and dismantles social justice.[23] This strand of literature could be characterized as idealizing the good old welfare state and neglecting the social achievements of the EU. The devastating criticism does not leave room for understanding the EU as a promoter of justice inside or outside, through

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Gemeinschaftsprivatrecht', in Staat und Wirtschaft in der EG (edited by Peter-Christian Müller-Graf/Manfred Zuleeg), Baden-Baden Nomos 1989, 17–52

[20] Shaffer, Gregory C, 'Theorizing Transnational Legal Ordering, Annual Review of Law and Social Science', 2016, Forthcoming; UC Irvine School of Law Research Paper No 2016–06. Available at SSRN: https://ssrn.com/abstract=2734318

[21] W Streeck, How will Capitalism End? Essays on a Failing System, Verso 2016.

[22] https://www.spiked-online.com/2019/03/29/the-eu-is-an-empire/

[23] Contributions in Dimitry Kochenov, Gráinne de Búrca, Andrew Williams (eds), Europe's Justice Deficit? Hart Publishing 2016.

legislation or through private regulation. In such a perspective, private regulation being understood as an opportunity to promote social values, human rights and democracy outside the EU legal orders looks like a *fata morgana*, far away from economic and political reality.

At the other end of the spectrum are voices like that of de Búrca,[24] a European legal scholar, now a professor at New York University. She identifies both the existing and potential role of the EU as a gentle civilizer. Her starting point is a quote from Martin Wolf in the *Financial Times*:[25]

> The principal political force is the commitment to the ideal of an integrated Europe, along with the huge investment of the elite in that project. This enormously important motivation is often underestimated by outsiders. While the Eurozone is not a country, it is much more than a currency union. Also for Germany, much the most important member, the Eurozone is the capstone of a process of integration with its neighbours that has helped bring stability and prosperity after the disasters of the first half of the 20th century.

She then claims:[26]

> Wolf's argument is that this underlying political commitment (what Weiler calls the messianic)[27] is what fundamentally and most powerfully continues to drive the European integration process. He then elaborates further on the EU's original mission of bringing peace and prosperity to the continent, asserting that 'the big idea that brings the members [of the EU] together is that of their place within Europe and the world'.
>
> There are two important insights in this brief commentary. The first is the emphasis on the continued salience of the EU's founding ideal, or mission. But the second is the reframing of the EU's founding ideal (bringing a degree of peace and prosperity to the continent) in a way that emphasizes the external as well as the internal relevance of European integration. …I suggest that this dual-facing mission – the development of a novel transnational relationship between the Member States, their citizens and the EU on the one hand, and the development of the EU's situation and role within the broader global context on the other, provides a better articulation of the EU's raison d'être today…

Is this overtly naïve and clandestinely supporting neoliberalism? Rodrigo Vallejo[28] characterizes the theoretical background behind the overall research project, the External Dimension of European Regulatory Private Law (ED-ERPL) as paradoxical, on the one hand studying and criticizing the ongoing transformations of private law, while on the other hand advocating its potential for the development of transnational law. Such an understanding does not follow the position invoked by Streeck. Quite to the contrary it contains a normative message. The idea of European Integration and European regulatory private law is regarded as providing for the potential to carry the internal European public good to the outside world. Hanoch Dagan[29] and Martijn Hesselink[30] have voiced strong resistance against the capacity of the EU to generate social values within the rationality of the Internal Market.

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[24] Gráinne De Burca, 'Europe's Raison d'être' in Dimitry Kochenov and Fabian Amtenbrink (eds), The European Union's Shaping of the International Legal Order (CUP 2013), 21.

[25] M Wolf, 'Why the Eurozone May Yet Survive: Members Remain Absolutely Committed to the Idea of an Integrated Europe', Financial Times, 17 April 2012.

[26] Gráinne De Burca, n 23, 21, 34–36.

[27] Weiler, JHH 'Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay', in J Dickson and P Eleftheriadis (eds), Philosophical Foundations of European Union Law (Oxford: OUP, 2012), 137–158.

[28] In this volume.

[29] Dagan, H 'Between Regulatory and Autonomy-Based Private Law' (2016) 22 European Law Journal 644–658.

[30] Hesselink, M W 'Private Law, Regulation and Justice' (2016) 22 European Law Journal 681–695.

Therefore the external reach of socially-inspired European private regulation might be even more demanding. The claim is by and large in line with de Búrca. That is why her idealism would equally touch upon the said paradox of ED-ERPL. The only way out of Streeck's criticism is to provide evidence for the claimed effects, theoretically and empirically. The current book on standards, codes and contracts is precisely meant to serve that very purpose. Whether this has been achieved or not is something I shall return to.

The role of critical legal scholarship

There is a second strand in Streeck's critique of the EU, one which tackles the role and function of left wing intellectuals in the European integration process. Streeck is very much focusing on political science, but his critique can easily be transferred to the role and function of European legal scholarship. The revitalization of the 'political economy of the law'[31] entails a kind of self-inception on the role and function that critical legal scholarship played in the building of the EU. Studying European law and defending the EU is no longer self-explanatory. Swimming against the ever stronger tide of critical voices, also and in particular from left-wing scholars like Streeck, requires justification and disclosure of one's position. On the question 'Why has the left become so attached to the EU?' Streeck answers:

> I wish I knew. Maybe because they confuse the EU with Europe? The EU is a deplorably undemocratic institutional construct that is so complex that you cannot understand how it works without extensive investigation – and even then you may not quite grasp what it is about. This means that you can read almost anything into it. You can identify it with personal dreams of a world that is free from historical burdens. Or you can see it as the embodiment of a pleasant consumerist lifestyle: rights without obligations, free travel, no taxes, immigrant labour, an international labour market for English-speaking university graduates. 'Europe' is your oyster: a playground for the new middle-class, the bobos, as the French call them: the bourgeois bohemians, the self-appointed cosmopolitans who believe that by importing cheap labour for their households they are doing something for the progress of mankind.

In 1944 Friedrich von Hayek accused left wing intellectuals of being complicit in socialism;[32] in 2019 Streeck accuses left wing intellectuals of being complicit in capitalism. The rightist Hayek and the leftist Streeck are united in their critique. Hayek criticised the sympathy of leftist intellectuals for grand ideas whilst undermining those grand ideals in daily practice. For his part, Streeck joins forces with Michel Houellebecq[33] in his criticism of the behaviour of intellectuals, in practice betraying their ideas and ideologies. I am taking sides neither with Hayek nor with Streeck.[34] I do sympathize with Milosz' *The Captive Mind* and his distinction between four types of intellectuals in Stalinist times: Alpha the Moralist, Beta the Disappointed Lover, Gamma, the Slave of History, and Delta the Troubadour.[35]

Each of the four shows astonishing similarities to the current behaviour of critical legal scholars in times of crisis.[36] Alpha is still searching for the new individual that could replace

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[31] David Singh Grewal, Amy Kapczynski and Jedediah Purdy, 'Law and Political Economy: Toward a Manifesto', 6.11.2017 https://lpeblog.org/2017/11/06/law-and-political-economy-toward-a-manifesto/ and P Kjaer (ed) The Law of Political Economy - Transformations in the Functions of Law, forthcoming Hart Publishing 2019.

[32] Friedrich v Hayek, 'The Intellectuals and Socialism', University of Chicago Law Review 1949 (16), 417, Available at: https://chicagounbound.uchicago.edu/uclrev/vol16/iss3/7

[33] Soumission, Flammarion 2015.

[34] It is worth looking into the book review by A Tooze, 'A General Logic of Crisis, Review of W. Streeck, How will capitalism end', London Review of Books, Vol 39 No 1, 5 January 2017, 3–8, which might prompt reflection on who is cynical: the leftists themselves or those who criticize the leftists.

[35] Czeslaw Milosz, The Captive Mind, (London: Penguin Books, [1953] 1980).

[36] For deeper analysis H-W Micklitz, 'The Transformative Politics of European Private Law', in Kjaer (n 30).

the Kantian ideal. This kind of thinking exists in neo-Marxist theories. Beta is demoralised, turning love into disappointment, while facing cynicism and self-destruction. European legal scholarship is full of betas. Gamma is still pursuing the once set political objective against all resistance and sometimes even against her own convictions. This attitude is dominant in the day-to-day business of doctrinal European legal scholarship and court practice.[37] Streeck would have to classify this kind of research as naïve as it promotes a neoliberal agenda without critical self-reflection. Delta is the opportunist, defending and criticising the EU at the same time. Many critical legal scholars will share Delta's bias. Are these the 'bobos'? What about Streeck and de Búrca and the lines of scholarship they present? How to classify them? I will leave it for the critical legal scholars themselves to reflect on where they stand. I would put myself into the category of Delta, perhaps with a touch of Gamma, in sympathy with J. Baquero Cruz'[38] reading of EU Law's legacy as the 'Law After Auschwitz', where he insists on the historical roots of the European integration project.

The revival of the political economy offers the opportunity not only to reflect on the role of intellectuals but to put the whole integration process and the role of the key actors at the European and the national level to an acid test.[39] Such an ideological critique (*Ideologiekritik*) might disclose uncomfortable truths, on the complicity of the Member States with the EU, on instrumentalizing the European level playing field to support decisions for which national governments in power could not find the necessary support in their home countries. Remember the Lisbon Agenda 2000 with its bombastic rhetoric of 'making the EU the most competitive economy in the world' and of replacing justice through the binary code of inclusion vs. exclusion.[40] Biased politics is everywhere apparent in dismantling the EU as a neoliberal hegemon and in idealising the golden age of the European welfare state. What is all too often lacking is a thorough look into the second limb of the political economy of law. Economics requires an impartial stock-taking of the costs of the welfare state, of the link between the sovereign debt crisis and the welfare state, not least of the 'who paid and who pays' for social benefits. Empirical research has blatantly proved the forceful formula of David Caplovitz, as epitomised in the title of his book *The Poor Pay More*.[41] The 'poor' are paying for the social achievements for the benefit of the 'haves' – bourgeois intellectuals.[42] But even the political economy of EU law suffers from an inward-looking perspective.

What does ideological critique mean for the external dimension of EU law and more particularly of European regulatory private law? Unanswered questions abound at both the political and the economic level. At the political level the question arises whether the EU despite all its internal deficiencies is still able to give its external relations a promising outlook. This could mean that non-statutory actors, private bodies and institutions are able to produce values that are in line with the ambitious Treaty objectives. Are private parties supposed to compensate for the deficits of public actors or are private parties the only

[37] Textbooks on European law and contributions in European law journals, such as the Common Market Law Review, the European Law Review, and the Yearbook of European Law.

[38] Julio Baquero Cruz, What's Left of the Law of Integration? Decay and Resistance in European Union Law (OUP 2018).

[39] Pierre Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 814.

[40] Guido Comparato,The Financialisation of the Citizen, Hart Publishing 2018.

[41] The Poor Pay More, Free Press 1967.

[42] Smith, TB, France in Crisis. Welfare, Inequality, and Globalization since 1980 (Cambridge; New York: CUP, 2004); Smith, TB, La France injuste. 1975-2006. Pourquoi le modèle social français ne fonctionne plus (Paris: Autrement, 2006).

potential actors who could promote 'the Social' beyond the nation state, at least within the scope of private law? At the economic level the question is what kind of effects are good and promising rules producing in countries that are not as strong as the United States and that are not able to cope with the Brussels effect. Raising standards on product safety, labour, consumer and environmental protection raises the access costs to the Internal Market to a degree which might be prohibitive. Neither EU law nor WTO law foresees the possibility of double standards on the Social to the benefit of the Global South.[43] These countries may produce more cheaply because of lack of appropriate standards in labour law, in health and safety at work, in consumer and environmental protection law in their home countries, but the products they produce and the services they deliver have to comply with 'higher' and 'better' EU standards. If the EU extends its values through private regulation to the Global South, the poorest of the poor might simply not be able to cope with the requirements, politically and economically. They might then lose their economic advantage which results from neglect of the values the EU aims to promote through the Treaty of Lisbon. This is another – unwanted – dimension of the Brussels effect.[44]

Efforts to overcome the democratic deficit and to save 'the Social' might at the very best help to maintain the EU as an attractive model with its unique combination of market integration and social regulation. My protagonist for the EU, Streeck, who understands the EU as a neoliberal hegemon, does not acknowledge such an opportunity:

> The EU's de facto constitution consists of the Treaty of European Union, which is practically impossible to revise, and the rulings of the Court of Justice of the European Union, which only the court itself can revise. The neoliberal core of the EU as an institution and the results of European integration were intended by its framers to be eternal and irreversible. This is shown by the hard opposition in Brussels to a British exit, and in the intention to make that exit as unpleasant as possible.
>
> It is also, and perhaps more importantly, visible in the inability of EU institutions to respond constructively to claims for more national autonomy, as expressed by various 'populist' countermovements. These movements are now blocking the process of European integration and there is a large risk that the insistence of Berlin, Paris and Brussels on prolonging and extending the established European institutions will lead to serious conflict between European nations, such as we have not seen since 1945.

Whereas the political direction of the impact seems to be rather clear, the economic implications remain more opaque. Does the return to the nation state, to national democracies, imply a revival of *national* economics? The 'my country first' rhetoric is gaining ground around the globe and triggering trade conflicts between China and the USA or between the EU and the USA. If free trade is affected so will private regulation and opportunities to realise the objectives of Articles 21 and 3 (5) TEU. Again, another voice is expressing a more optimistic outlook on Europe's future and the transformability of the EU. Critical scholars from all over Europe have started a ground-level initiative over the internet gathering support for democratization of the Treaty through a European assembly which strengthens the role of the nation states and advocates a European tax that serves to re-establish solidarity between the peoples of the EU:[45]

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[43] For an early discussion of the mismatch between internal rules and the implications for the rest of the world, H-W Micklitz, Technische Normen, Produzentenhaftung und EWG-Vertrag, NJW, 1983, 483–489, at 489.

[44] A Bradford is currently undertaking research on the impact of the Brussels effect on the Global South, Statement during her presentation at the EUI on 8 April 2019.

[45] http://tdem.eu/en/manifesto/

> We, European citizens, from different backgrounds and countries, are today launching this appeal for the in-depth transformation of the European institutions and policies. This Manifesto contains concrete proposals, in particular a project for a Democratization Treaty and a Budget Project which can be adopted and applied as it stands by the countries who so wish, with no single country being able to block those who want to advance. It can be signed on-line (www.tdem.eu) by all European citizens who identify with it. It can be amended and improved by any political movement.

At the time of writing it is by no means clear in which direction the EU will move after Brexit, whether there will be a window for reform or not and if there is a window what the direction will be. The painful process of the Brexit negotiations has suffocated voices in other Member States to leave the EU following the UK example – for now. Those who might interpret this outcome as a success should not overlook that this account is the result of a power play, in which the EU is behaving like an economic and political hegemon. The EU has brought the United Kingdom to its knees. This sounds more like Gamma the slave of history than like Delta the Troubadour. For the future of the two together, these are hardly promising prospects. The cracks in the international economic order are much clearer and much more visible. The USA and the EU are engaging in ever more bilateral trade agreements, occasionally in regional trade agreements; industry is transforming trade relations into global value chains.[46] Whether the post Second World War order will survive the 'my country first rhetoric', the rise of bilateral and regional agreements as well as global value chains remains to be seen. Maybe what we can observe is already the awakening of a new fragmented international economic order. What does this all mean for the external dimension of standards, codes and contracts?

With regard to the current state of affairs of European regulatory private law within the EU, I have tried to show that the EU is more than just a neoliberal hegemon. The rise of consumer law, within limits employment law, and more particularly non-discrimination law demonstrates that the EU has been able to generate a genuine understanding of 'the Social'. I have made four claims:[47] firstly, that the European Union legal order is not limited to market rationality alone. It has yielded a genuine pattern of justice, what I have termed access justice. Secondly, the Social is characteristic of the EU and the Member States as they stand today. In the transnational society that the EU is about to build, where the grip of public power is weakened, the market intermingles with society. Therefore a new form of justice can be identified – societal justice. Thirdly, the EU is the laboratory where the adaptation processes of an economic order occur, an order that that merges market rationality, access justice and societal justice in a globalised world, intermingling substantive, procedural and institutional elements of governance.[48] Fourthly, the responsibility for European experimentalism lies jointly with the EU, the Member States and private parties. In European private law beyond the nation state, business turns into the addressee of social responsibility, but also private parties, provided they have the capabilities, bear a responsibility for building a transnational European market society.[49] Whilst underdeveloped and certainly not yet mainstream, EU law allows for transforming political responsibility into

[46] R. Baldwin, The Great Convergence: Information Technology and the New Globalization (Cambridge: Belknap Press of Harvard University Press, 2016).

[47] H-W Micklitz, The Politics of Justice in European Private Law, CUP, 2018.

[48] Ibid at 30 on the different levels of governance with regard to the external dimension; R Vallejo in this volume also on the external dimension.

[49] Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016), 116(6) Columbia Law Review, 1395–1460; Hanoch Dagan/Michael Heller, The Choice Theory of Contracts, CUP 2017.

the legal responsibility of private parties, in particular of private companies and private regulators, at least within the EU.[50]

The ED-ERPL project is meant inter alia to test these findings in the relationship between the EU and the outside world. Is it possible to transfer the achievements of the inner EU to its external relations? In *foro interno in foro externo* – to paraphrase the famous article by Pierre Pescatore?[51] My defence of the European Social Model is mostly based on secondary EU law: labour law, consumer law, non-discrimination law, the law the EU has adopted within its given competences, and how European private law has transformed national laws, thereby generating access justice and societal justice, standing side by side with national patterns of social justice. Analysing the external dimension of European private law would therefore require a look into extraterritoriality and the external reach of EU labour law, consumer law and non-discrimination law. Indeed, the ED-ERPL project is investigating the impact of EU consumer law on national legal systems in Africa, in Asia and in South America. It would go beyond the purpose of an epilogue to report on the findings.[52]

Seen through the theoretical framework of the ED-ERPL, the current book and its contributions provides insights into how private parties are using the increased liberties to shape the relationship b2b and b2c, whether there is evidence for external reach and whether it is possible to trace elements of justice in standards, codes and contracts. In theory, societal justice would have to play a prominent role in an economic environment where binding EU rules lose importance and where compliance with the inner standards of EU private law becomes discretionary.

The place for standards, codes and contracts

In the light of the foregoing – what, then, is the role of the EU, EU bodies and EU institutions, of European companies and European NGOs in the field of standards, codes and contracts? Is it possible and feasible on the basis of the contributions to this book to give an answer, however tentative it might be, as to whether the EU is the grand civilizer in helping to establish a transnational society or merely a neoliberal hegemon in disguise using private regulation as a means of extending the internal market rationale? I will break down my considerations into three different aspects: access and expertise; private, public and semi-private actors in private regulation; and evaluation of 'better' rhetoric. I will conclude with an outlook on the tension between reality and potentiality.

Access to the research field and expertise in the research field – practice and theory

Studying private regulation in whatever area immediately provokes the question how to gain access to the information needed. Access to information is all too often equated with gaining access to a club.[53] As long as the study object results from a collective exercise, from

[50] Azoulai, L 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realisation' (2008) 45 CML Rev 1335–1355.

[51] P Pescatore, 'External Relations in the Case-law of the Court of Justice of the European Communities', CML Rev 16 (1979) 615.

[52] On Africa see the contributions in the special issue of the Journal of Consumer Law 2018. Asian consumer law and its interaction with the EU is part of a book edited by M Durovic/G Howells/A Janssen/H-W Micklitz, Consumer Protection in Asia: Past, Present and Future, to be published in 2020 with CUP. South American consumer law will be published in a special issue of the Journal of Consumer Law in 2020 under the joint responsibility of Cl Lima Marques and Hans-W Micklitz.

[53] R van Gestel/H-W Micklitz, 'European Integration through Standardisation: How Judicial Review is breaking down the Club House of Private Standardisation Bodies', CML Rev 2013 (50), 145–182.

business associations in the broadest sense, access is relatively easy. Nowadays, most information is available on the Internet. This changes when the study object is related to one company, for example to the contract a particular company is using to organize its supply chains. Even if this hurdle can be overcome the difficulty remains as to how to assess the practical impact of standards, codes and contracts. Typically, research on private regulation relies on qualitative methods, in the end on interviews with shareholders and stakeholders in the field. To conduct quantitative research on the whole sector requires considerable research funds. In a perfect world, each complements the other. But the question remains of the politics behind empirical research.[54]

Clearly, the contributors managed to obtain access to information and access to the club. Most of the factual analysis provides results from insider knowledge gained through qualitative interviews or from being a member of the club, or both. The empirical researcher has to navigate their project between the Scylla of no access means no information and the Charybdis of receiving access at the price of membership means losing independence. I do not want to be misunderstood. I have found myself all too often squeezed between bad choices and I know how difficult it is to resist the promising temptation of being accepted into the club. The risk of biased empirical research is the stronger, the narrower the field and the more limited the number of actors. Where is the remedy? I would propose going back to Milosz and the four types of intellectuals again.

A considerable degree of expertise is needed in order to be able to understand the rationale of the respective market, sector or rules. There is certainly a need to clarify what an expert is and what expertise means.[55] Luhmann's finding of the ever-more-fragmented society is equally reflected in the sectorisation of markets, what Cantero calls verticalisation,[56] not only with regard to the three forms of private regulation here under scrutiny but also within its study object. Technical standards in the production of cars cannot be so easily compared to technical standards in the field of banking and finance. Codes of practice are sector-related and contracts even – if used to organize supply chains – demonstrate a high degree of diversity. Each of the contributors is an expert in the field they are studying, sometimes for years building their own contact network which guarantees access and which allows them to generate informal knowledge. I will certainly not claim to be a more knowledgeable expert. Therefore, I will not comment on the substance of the findings. In what follows I take the analysis for granted.

Relating the overall question of the role of the EU and of EU law to the different contributions, one observation springs to mind: the key role of empirics. The findings more often than not allow for a well-grounded answer. Empirics is like a drug. Once you start studying the reality of private regulation (in our case), you easily realise that you need to know more, more about the substance – the content and the inherent values – more about the procedure – who is actually participating in rule-making and with what intentions – more on the institutional setting – how bodies and associations are interacting with transnational and national actors and under what rules and conditions. The list of 'more' could easily be extended. Many of the contributions even point to the need for more research in order to be

[54] H-W Micklitz/A Villanueva, 'Refit or Rethink: The Politics of Research in the EU', to be published in E van Schagen/St Weatherill (eds), Hart Publishing, 2019.

[55] E Korkea-Aho/P Leino organized a workshop on expertise and experts in Helsinki in June 2018. The contributions will be published as 'The Politics of Legal Expertise' in 2020.

[56] M Cantero in this volume.

able to answer the guiding question. The 'more', however, is structurally inbuilt. There is never enough 'more'.

The therapy for terminating the dependency of empirics is to go back to theory. Vallejo[57] proposes understanding ongoing developments in private regulation as being part of the merger between the public and the private, between the internalities and the externalities of the EU, between the vertical and the horizontal, what he terms 'private administrative law'. The concept of private administrative law allows for putting private regulation under a single theoretical and conceptual umbrella. Seeing the contributions to the book in this way may very well inspire the 'idea of private administrative law'. That is why it is intellectually *more* (sic) rewarding to draw conclusions on the basis of information which has been delivered.

Private, public and semi-private actors

The variety of actors is characteristic of the field of transnational private regulation. The contributions cover the role and function of the European Union/European Commission in energy[58], finance[59], online platforms[60], supply chains[61] and arbitration,[62] the role and function of semi-public bodies such as European[63] and international standards bodies[64] and the role and function of private associations and companies in the food sector[65] and in the organisation of the internet.[66]

The first question that arises is whether a link exists between the degree of publicness/privateness and promotion of the public good.[67] As the saga goes, one might assume that promotion of the public good is the stronger the 'more' public the key actors are. If we include nation states on the side of public actors, then the decline of the public good would go hand in hand with the change of the level playing field, from nation state, to the EU to international bodies. The public good is suggested to be the better protected the closer the grip at the national state level on private actors; conversely, the public good is the lesser respected the stronger the influence of private actors within or outside a binding transnational frame. The overall consequence is abundantly clear: the public good can best be protected at the nation-state level; whether the EU is able to protect the public good throws us back to the diametrically opposite assessments of Streeck vs de Búrca. In contrast to the international level, the EU disposes of a legal order, of law-making institutions, enforcement authorities and an independent court. In theory the European legal order should be better suited to carrying the public good than the international legal order.

Is this correct? The contributions seem to tell a differentiated story. There are areas where public bodies do not play a role or, if any, a role in backing the activities of private actors, such as ICANN, in the development of CSR in the Dutch banking sector or in the

[57] R Vallejo in this volume and the same, 'After Governance. The Idea of Private Administrative Law' in Kjaer (n 30).
[58] L de Almeida in this volume.
[59] T Juutilainen, A Marcacci and K Pijl in this volume.
[60] Ch Busch in this volume.
[61] M de la Cuesta in this volume.
[62] B Warwas in this volume.
[63] R van Gestel/P van Lochem in this volume.
[64] M Mataija in this volume.
[65] P Verbruggen in this volume.
[66] G Spindler in this volume.
[67] For the sake of argument I equate public good with Arts 21 and 3 (5) TEU.

management of transnational food safety. There are equally semi-public bodies like CEN/CENELEC and ISO/IEC whose standard-setting activities form part and parcel of a European respectively an international framework.[68] Within that regulatory framework product safety is deeply embedded and forms an integral part of private regulation. Finance tells a very particular story. The European Commission is participating in IOSCO. However, its role does not seem to be to promote investor protection and social rights. Quite the opposite, the European Commission is using the international level playing field to liberalise the European capital market.[69]

The second issue that deserves attention is how the different actors are using EU law. It seems as if all European actors are united in one single objective – to use private regulation as a means through which the reach of EU law can be extended. This is particularly evident in the contributions by Paul Verbruggen on food safety, Barbara Warwas on the promotion of arbitration as a means of stretching EU law beyond its boundaries,[70] Lucila de Almeida on the integration of EU mandatory standards into energy contracts and María Paz de la Cuesta on the promotion of fair trading in supply chains. Whilst private regulation pursues mostly concrete policy-related objectives such as safety or fairness, the situation is different with regard to the role and function of what has become famous under the notion of the 'new approach'. The EU regulatory framework, in its interplay of a binding legal framework which empowers private standard bodies to translate broad policy aims into concrete standards, inspired the WTO/TBS agreement.[71] Here it is not a particular field of EU law but the overall European institutional framework that inspired the making of international law. It has to be recalled that the philosophy behind the 'new approach' inspired the design of the Single European Act. A kind of constitutional dimension is hidden in the new approach. The 'law on standards'[72] covers what I have termed societal justice. The key role of private actors comes at a price. They become the holders of responsibilities towards the public. The opening towards society, even if rather limited, is documented in the integration of civil society organisations in the elaboration of such standards.

The three recent judgments of the ECJ in the field of technical standards – *Frabo, Elliott and Schmidt*[73] – demonstrate the preparedness of the ECJ to submit European technical standards to a thoroughly restricted judicial review. Details do not matter. It is the simple fact that counts. The ECJ seized the first opportunity to open up a new chapter in the relationship between voluntary non-binding technical standards and the legal order. The few decisions do not yet allow discovery of a clear line of argument, but the message of the ECJ to private regulators is clear.[74] We, the court, are ready to take a closer look at what you are

[68] Lucila de Almeida, Marta Cantero Gamito and Hans-W Micklitz, 'Institutional and Normative Cooperation in Private Law, Beyond the Hague Conference towards Standard Setting Organizations', in J Odermatt/R Wessel (eds) Research Handbook on the European Union and International Organisations, forthcoming Elgar 2019.

[69] For a much deeper analysis of the role of EU law and the relevant actors in the management of financial stability, P Davies, 'Financial Stability and the Global Influence of EU Law', in M Cremona/J Scott (n 4), 146.

[70] She could not yet integrate Opinion 1/17, decided on 30 April 2019.

[71] P Mavroidis, The Regulation of International Trade, Volume 2 The WTO Agreements on Trade in Goods, 473 MIT Press 2016; H-W Micklitz, Internationales Produktsicherheitsrecht, Nomos Baden-Baden, 1994, 267.

[72] H Schepel, The Constitution of Private Governance (Oxford: Hart Publishing, 2005); same author, 'The Empire's Drains, Sources of Legal Recognition of Private Standardisation under the TBT Agreement', in Ch Joerges/E-U Petersmann (eds), Constitutionalism, Multilevel Trade, Governance and International Economic Law, 2 edn, Hart Publishing 2011, 397; P. Vallejo under II.4. in this volume.

[73] ECJ Case C-171/11, *Fra.bo* [2012] ECR I-000; Case C-613/14, *James Elliott Construction* [2016] ECR I-000; Case C-219/15, *Schmitt* [2017] ECR I-000.

[74] P Delimatsis (ed), The Law, Economics and Politics of International Standardisation, CUP 2015.

doing within your standards bodies, if not in substance then at least in terms of procedural requirements and the broader institutional framing in which private standard-setting operates. This case-law, if hardened, will certainly not remain without impact beyond EU territory.

The 'better' rhetoric

The most difficult question to answer is certainly whether and to what extent the extension of private regulation beyond European territory is for the 'good' or for the 'bad'. To paraphrase what Mark Freedland[75] said about the relationship between the EU and the UK with regard to the 'Social' – are the standards, codes and contracts that govern economic transactions around the globe a bit more social due to the European legacy on the importance of the Social for a market economy or is the EU dismantling the social legacy by changing the level playing field from the European to the transnational, using the transnational/global market integration as a trigger to downgrade social regulation? What is the relationship between higher standards and better procedural guarantees? Is there a relationship with the latter serving to enhance accountability specifically in relation to the former? What is at stake here is the answer to the question whether the EU is apt to extend what I term access justice to the outside world either through EU-induced private regulation or through private regulation alone though inspired by the European Social Model.

The contributions provide a mixed account. Again I take the assessments for granted and I refrain from questioning or commenting on what the experts in their own fields have found. The European regulatory hand is certainly visible in the field of product safety and food safety. Here it looks as if all actors involved aim at stretching good European standards beyond EU territory. This goes along with Anu Bradford,[76] who uses food safety as one field in which the Brussels effect unfolds. Similar conclusions could be drawn with regard to the defence of fairness in supply chains, the promotion of fair access to energy supply platforms[77] or attempts to stretch ADR dispute settlement procedures beyond EU territory.[78] However, it would be premature to draw from a few examples general conclusions on the kind of justice which is provided – or not. Financial services seem to be an area where the EU is precisely playing the role that their forceful critiques are advocating. The EU is liberalizing investments via a detour over the international level playing field.[79] A counterexample is securitization, where the EU is joining forces with IOSCO to set standards not only for the EU but maybe beyond the EU.[80] Whether these standards are good or bad for the Social is a point for discussion.

EU regulation of technical standards is playing an outstanding role in the literal sense. The external reach of the EU model is interesting for three reasons – the EU has managed to promote product safety through their integration into the elaboration of technical standards. There would not have been a TBT/SPS agreement at the international level without the commitment of the EU to product safety regulation and the joining together of laws and technical standards.[81] The European model has served as an inspiration for the

[75] In a personal communication to the author on what remains of European labour law in the UK after Brexit.
[76] A Bradford, (Fn. 2)
[77] L de Almeida in this volume.
[78] B Warwas in this volume.
[79] A Marcacci in this volume.
[80] T Juutilainen in this volume.
[81] For deeper analysis, P Verbruggen, Enforcing Transnational Private Regulation, A Comparative Analysis of Advertising and Food Safety, Edward Elgar2014.

making of transnational standards, which is true with regard to the procedure and the overall institutional framework – co-operation between the legislator and private standard bodies. It is open for discussion whether reform of the European regulatory framework as proposed by van Gestel/Lochem[82] would or could impact the design of standard-setting in ISO/IEC and other international standard-setting bodies. Read together with the recent judgments of the ECJ, such an external extension might be highly likely.

A final word – Legitimacy, Reality, Potentiality

The contributions to this book do not discuss why and under what conditions it might be for the EU to tell the rest of the world why they should follow the EU in their better and higher standards of consumer protection, environmental protection, health and safety, broader participation of civil society in making the rules and increased accountability of those who make and enforce standards, codes and contracts. Overall the contributions do not question the legitimacy of the EU to extend European regulatory private law beyond its boundaries; they simply take it by and large for granted whenever they engage with the particularities of the field they are working on. With regard to the inward dimension of European regulatory private law, I have argued that the EU is able to generate access justice and societal justice. Whether the generation of justice in the EU could legitimate its extension beyond EU territory is a question that still awaits an answer. This would require a deeper engagement with approaches in the framework of the WTO and the EU that investigate the conditions under which the EU's approach might be legitimated. In international trade law, there is a widely recognized difference between whether states and/or supranational institutions enforce internationally agreed standards, codes and contracts, or whether they impose their own assessment on the rest of the world. The EU is clearly doing more: it is part of the EU's constitutional agenda. This mandate raises much deeper questions on the legitimacy of EU action.[83] I will leave the discussion on the potential link between WTO law, EU law and ERPL for a later stage.

What remains is a kind of stocktaking, a comparison of the reality vs the potentiality. In the light of the most ambitious objectives enshrined in Articles 21 (1), 3(5) and 21 (2) h) TFEU, the question remains how deep the gap is between what the EU is supposed to do and its actual behaviour. The attractiveness of the EU as a model for the outside world will to a large extent depend on whether the EU succeeds in maintaining, if not enlarging, its social legacy in a globalized world. Private law and private regulation is not at the forefront of political awareness, although it forms the foundation on which the international economic order rests. Here formal competences of rule-making matter less than private initiatives and whether these are responsibly exercised.

The contributions demonstrate a rather mixed picture of the current role of the EU, the European Commission, European private associations such as CEN and CENELEC as well as of the role of EU law and the practical extension of values such as 'safety and fairness'. Many if not most contributions combine the 'as is' analysis with how 'the law should be'. These

[82] In this volume.

[83] Eg, Oisin Suttle, Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation, Cambridge, CUP, 2018, distinguishing between different scenarios under which such an external reach can be justified, with regard to the EU context; J Scott 'The Global Reach of EU Law' in M Cremona/J Scott (n 4), 21 argues that the concept of complicity can provide a framework as to whether/when/how the EU ought to intervene when the activities of natural or legal persons closely connected with the EU contribute to significant wrongdoing that takes place abroad.

normative assumptions are guided by the conviction that the EU has something to offer and that the EU is in principle able to turn its policy agenda into a more convincing reality. Anu Bradford's Brussels effect might sound like a threat to the USA and maybe to China, if not to the Global South. Rather than turned into a slogan for a more social economic order and a more just society, the Brussels effect might well be the mission the EU needs to complete, if it wants to maintain (?) and/or regain (?) its attractiveness for non-EU Member States and for regional economic orders.